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In The Supreme Court of the United States

AMIR X. S.,
a juvenile under the age of seventeen,
Petitioner,

v.

STATE OF SOUTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether South Carolina's statutory provision proscribing "disturbing schools" is substantially overly broad in violation of the Constitution of the United States because it prohibits the freedom of speech and expression protected by the First Amendment in a manner which is unnecessarily broad and permits public officials to wield unlimited discretionary powers in its enforcement.

2.

Whether South Carolina's statutory provision proscribing "disturbing schools" is unconstitutionally vague because a person of common intelligence must guess at its meaning and differ as to its application and Petitioner has standing to challenge the statute because it restricts conduct protected under the First Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF CONTENTS 2

APPENDIX INDEX 5

TABLE OF AUTHORITIES 6

CITATION TO OPINION BELOW 8

JURISDICTION 9

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 9

STATEMENT OF FACTS

Procedural history 10

HOW THE FEDERAL ISSUE WAS RAISED BELOW 11

WHY THE WRIT SHOULD BE GRANTED

1.

The writ should be granted because South Carolina's statute infringes on the First Amendment guarantee of the freedom of expression in that it prohibits any person from engaging in expression that may "disturb in any way or in any place" or may be

"obnoxious" in any school or college. The statute sweeps unnecessarily broadly and punishes a substantial amount of protected conduct beyond that which is necessary to achieve the government's legitimate goal of maintaining order in schools. 13

2.

The writ should be granted because the South Carolina Supreme Court failed to recognize that Petitioner had standing to challenge Section 16-17-420 on the grounds of vagueness because the statute violates the First Amendment right to freedom of expression, allowing persons whose conduct is not protected to challenge the statute, and the South Carolina Supreme Court should have found the statute was void for vagueness 19

A. The South Carolina Supreme Court failed to recognize this Court's precedent that holds that a person whose conduct is not protected has standing to challenge a statute on the grounds of vagueness if the statute violates the First

Amendment right to freedom of expression 20

B. The South Carolina statute that forbids certain protected behavior in schools is void for vagueness 20

CONCLUSION 24

APPENDIX

1. OPINION OF THE SOUTH CAROLINA SUPREME COURT A-1

2. ORDER DENYING THE PETITION FOR REHEARING A-15

TABLE OF AUTHORITIES

CASES

Ashton v. Kentucky, 384 U.S. 195 (1966) 15
Cole v. Richardson, 405 U.S. 676 (1972) 13
Edwards v. South Carolina, 372 U.S. 229 (1963) 15
Graynard v. City of Rockford, 408 U.S. 104 (1972) .... passim
In Re Amir X. S., 639 S.E.2d 144 (2006) 12,16,18
Kolender v. Lawson, 461 U.S. 352 (1983) 19, 20, 21, 22
Landry v. Daley, 280 F. Supp. 938 (D.C. Ill. 1968) 15
Lanzetta v. New Jersey, 306 U.S. 451 (1939) 23
McAlpine v. Reese, 309 F.Supp. 136 (D.C. Mich. 1970) 17
N.A.A.C.P. v. Alabama ex rel. Flowers, 377 U.S. 288 (1964) 13
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 15, 22
Parker v. Levy, 417 U.S. 733 (1974) 20
Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) .. 15
Thornhill v. Alabama, 310 U.S. 88 (1940) 15, 16
Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 14
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 20
Winters v. New York, 333 U.S. 507 (1948) 23

STATUS

S.C. Code § 16-17-420(1976) ..... passim

OTHER AUTHORITIES

28 U.S.C §1257(a) 9

RULES

Rule 203(d)(1)(C), SCACR 11

CONSITUTIONAL PROVISIONS

U.S. Const. amend. I 9, 17, 22, 23

U.S. Const. amend. XIV 9, 22

SUPREME COURT OF THE UNITED STATES

No. _____

AMIR X. S., a juvenile under the age of seventeen,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Amir X.S. asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming Petitioner's conviction appears as *In the Interest of Amir X.S.*, a juvenile under the age of seventeen, 371 S.C. 380, 639 S.E.2d 144 (S.C. 2006). App. 1-9.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on November 6, 2006. The South Carolina Supreme Court denied the petition for a writ of certiorari on January 18, 2007. App. p. 16. This Court's jurisdiction is invoked pursuant to 28 U.S.C §1257(a), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1.This case involves South Carolina Code Section 16-17-420 (1976), which provides in pertinent part, that "[i]t shall be unlawful: (1) [f]or any person willfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon . . ."

2.It involves the First Amendment to the Constitution of the United States, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3.It involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law . . . ."

STATEMENT OF FACTS

Petitioner Amir X. S., a juvenile, was charged by juvenile petition with disturbing schools in violation of South Carolina Code 16-17-420 (1976) and simple assault in Greenwood County, South Carolina. Amir appeared before the Honorable John M. Rucker, in Greenwood County Family Court on November 30, 2004. E. Charles Grose, Jr. represented Petitioner at the lower court level.

During the adjudication, Amir's former teacher at Southside Learning Center, Lynn Martin, testified that Amir did not want to sit down and do any of his work while she took roll at the beginning of class at 8 a.m. R. p. 12, lines 14-16. He continued to talk and walk around the classroom during instruction time. R. p. 12, line 23 – 13, line 1. According to Martin, Amir threw papers on the floor and put his feet on the desk. R. p. 12, lines 9-13. Martin testified that Amir was "rude and disrespectful" to her and the other students. R. p. 14, lines 2-7. She asked him twice to stop and he would not. She decided to remove him from the classroom around 10:30 a.m. R. p. 14, lines 7-9. Amir left the classroom willingly with Martin's assistant. However, according to Martin, he swung at Martin as he went out the door. R. p. 15, line 16 – p. 16, line 3.

Martin testified that Southside is an alternative school for students who have been asked to leave their home school "for disruption and for behavior." R. p. 19, lines 12-14.

Amir testified on his own behalf and stated that he only got out of his seat to sharpen his pencil and to ask another student a question. R. p. 37, lines 23-25. He said that Martin told him to leave and that he jerked away from her when she tried to touch him as he was leaving the classroom. R. p. 39, lines 1-8.

Judge Rucker found Amir guilty of disturbing school and

simple assault and adjudicated Amir delinquent. He sentenced him to ninety days in the custody of the South Carolina Department of Juvenile Justice unless sooner released to alternative placement. He also ordered him to serve one year of probation.

HOW THE FEDERAL ISSUE WAS RAISED BELOW

Before trial, Amir's counsel argued that that South Carolina Section 16-17-420 proscribing "disturbing schools" is both vague and overbroad. R. pp. 6-8. Counsel also submitted a written motion to quash the petitions. R. pp. 63-70. Judge Rucker ruled that the statute was constitutional. R. p. 8, lines 23-25.

Amir appealed, filing his notice with the South Carolina Supreme Court, which took jurisdiction under South Carolina Appellate Court Rule 203(d)(1)(C), SCACR, because the issue involves the constitutionality of S.C. Code Section 16-17-420 of the South Carolina Code of Laws. On appeal, Amir was represented by Eleanor Duffy Cleary, Appellate Defender, South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his brief, Amir raised the following issues:

> I.Did the trial judge err in finding Section 16-17-420, which proscribes "disturbing schools," is constitutional, where it violates the United States Constitution because it is overly broad in that it encompasses conduct that is protected by the first amendment?

II.Did the trial judge err in finding Section 16-17-420, which proscribes "disturbing schools," is constitutional, where it violates the United States Constitution in that it is vague since a person of common intelligence must guess at its meaning and differ as to its application?

After oral argument, the South Carolina Supreme Court affirmed the family court's ruling that Section 16-17-420 is not unconstitutionally overbroad. The Court held "that § 16-17-420 does not punish a substantial amount of protected speech, and accordingly, does not warrant overbreadth adjudication." *Amir X. S.*, 639 S.E.2d at 149-150. The South Carolina Supreme Court vacated the family court's decision finding the statute was not unconstitutionally vague, holding that Amir did not have standing to challenge Section 16-17-420 for vagueness. The Court stated "[b]ecause Appellant [Amir] does not have standing to challenge § 16-17-420 on grounds of vagueness, we do not address the merits of his argument that the terms of § 16-17-420 are so vague that a person of common intelligence must necessarily guess at its meaning." *Amir X. S.*, 639 S.E.2d at 150.

Amir filed a petition for rehearing on both issues, which was denied.

WHY THE WRIT SHOULD BE GRANTED

QUESTION1

The writ should be granted because South Carolina's statute infringes on the First Amendment guarantee of the freedom of expression in that it prohibits any person from engaging in expression that may "disturb in any way or in a .y place" or may be "obnoxious" in any school or college. The statute sweeps unnecessarily broadly and punishes a substantial amount of protected conduct beyond that which is necessary to achieve the government's legitimate goal of maintaining order in schools.

South Carolina Section 16-17-420 is unconstitutional on its face. The statute infringes on the freedom of expression in that it attempts to prohibit one's right to "disturb" and to "act in an obnoxious manner" in any school or college. S.C. Code Ann. § 16-17-420(1) (1976). Clearly, the right to engage in free speech that "disturbs" and to be obnoxious is protected by the constitution. "The First Amendment leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us." *Cole v. Richardson*, 405 U.S. 676, 688 (1972).

This Court has repeatedly held that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

Even if the governmental purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 308.. The state has

the power to regulate the school environment to further its interest in education. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). However, expressive activity may only be restricted "if the forbidden conduct materially disrupts class work or involves substantial disorder of invasion of the rights of others." *Graynard v. City of Rockford*, 408 U.S. 104, 118 (1972). This statute does much more than forbid such conduct. It forbids a student debate where one student expresses "disturbing" ideas and another responds with an "obnoxious" retort. This sort of exchange of ideas is the bedrock of our educational system, like our media, and its prohibition may make the nation more orderly and tranquilizing, but it certainly will not make the nation closer to that envisioned by our founding fathers, who reveled in the thought of the freedom to voice disturbing views.

As this Court noted:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehood may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil

> averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

If "the scope of the power permitted [government] officials is so broad that the exercise of constitutionally protected conduct depends on their own subjective views as to the propriety of the conduct, the statute is unconstitutional." *Landry v. Daley*, 280 F. Supp. 938, 951 (D.C. Ill. 1968) (overruled on other grounds). (citing e.g. *Ashton v. Kentucky*, 384 U.S. 195, 200-201 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-92 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 237-238 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 435-436 (1963)).

Clearly this statute is unconstitutionally broad because it "permits police and other officials to wield unlimited discretionary powers in its enforcement" based on "their own subjective views as to the propriety of the conduct." *Landry*, *supra*.

Furthermore, because of the potential chilling effect on the exercise of constitutionally protected rights, overly broad laws may be challenged even if the law is constitutionally applied to the challenger's conduct. *Graynard v. City of Rockford*, 408 U.S. 104 (1972). *Thornhill*, *supra*. In this

case, even though the statute may have been properly applied to Petitioner's conduct, he nonetheless has standing to challenge this clearly overly broad statute.

The South Carolina Supreme Court incorrectly held that the statute does not "punish a substantial amount of protected speech, and accordingly, does not warrant overbreadth adjudication." *In Re Amir X. S.*, 639 S.E.2d 144 (2006). The South Carolina Supreme Court correctly noted, a "party challenging a statute [on overbreadth grounds] simply must demonstrate that the statute could cause someone else – anyone else – to refrain from constitutionally protected expression." *Id.* Petitioner demonstrated that the statute could cause anyone from refraining from constitutionally protected expression, as discussed herein.

The South Carolina Supreme Court incorrectly applied this Court's precedents to the South Carolina statute. In its opinion, the South Carolina Supreme Court noted that the United States Supreme Court found that an ordinance that prohibited disturbing schools was upheld in *Graynard, supra*. However, the South Carolina Supreme Court failed to recognize that the statute at issue in *Graynard* was much narrower than S.C. Code Section 16-17-420. That ordinance prohibited the willful making or assisting in "the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . ." *Id.* at 107-108 (emphasis added). South Carolina's statute, in contrast, prohibits much more than conduct that disturbs the order of the school.

Without a doubt, as the South Carolina Supreme Court noted, the state has an interest in maintaining order in schools so that learning may occur. However, this statute also prohibits disturbing any other student or teacher "in any way," regardless of whether the disturbing of that student or that teacher disrupts the peace and good order of the school.

Secondly, South Carolina's statute forbids acting obnoxious at school, regardless of whether such behavior disturbs the order of the school. Unlike the statute in *Graynard*, South Carolina's statute forbids much more than conduct that materially disrupts class work or normal school activities. South Carolina's statute forbids expressive conduct that is protected by the First Amendment.

The South Carolina Supreme Court also found South Carolina's statute to be analogous to that found in *McAlpine v. Reese*, 309 F.Supp. 136 (D.C. Mich. 1970), in which the federal district court in Michigan upheld a state ordinance. The ordinance in that case provided that "[n]o person shall willfully or maliciously make or assist in making any noise, disturbance, or improper diversion by which the peace, quietude or good order of any public, private, or parochial school is disturbed." *McAlpine*, 309 F. Supp. at 138. However, the South Carolina Supreme Court failed to recognize that this ordinance, like that in *Graynard*, prohibits actions which interfere with the order of the school. As the *McAlpine* court noted, the ordinance did not prohibit any expression "save that which disturbs the quietude of the school." *Id.* at 140. Again, South Carolina's statute prohibits conduct that is "disturbing" or "obnoxious" regardless of whether it has a detrimental affect on the state's legitimate purpose of maintaining order in the schools. Unlike the ordinance in *McAlpine*, South Carolina's statute clearly prohibits activities that do not necessarily disrupt the order of the schools.

The South Carolina Supreme Court held that section 16-17-420 prohibited conduct that is not protected by the First Amendment and instead restricts expressions when accompanied by disorder or disturbance of schools. The Court stated, "it does not explicitly prohibit any type of gathering or expression except those which disturb the learning environment in South Carolina's schools." *Amir X.*

S., *supra*. As discussed above, the statute prohibits expression even when the school is not disturbed or put into disorder. The statute does prohibit expression even if it does not disturb the learning environment in South Carolina's schools.

This statute must be found unconstitutional because the extent of its overbreath is sure to have a chilling effect on students or teachers by leading them to hold their tongue when their speech might "interfere with" or "disturb in any way or in any place" any other student or teacher in the state or when their speech or activity might be construed as "obnoxious" by overzealous law enforcement. A free society that promotes education as a means to good citizenship in a democracy simply cannot tolerate such a risk.

Petitioner asserts that the statute potentially punishes participants in a school debate who express unpopular, disturbing, or arguably obnoxious viewpoints. The South Carolina Supreme Court held that such expressive conduct would not come within the scope of Section 16-17-420, and further stated "nor would this Court construe it that way." *Amir X S., supra.* The protected speech in a debate or classroom discussion clearly could come within the scope of the statute because the statute does not require disruption of the peace and good order of the school for a person to be convicted under the statute. Despite the South Carolina's Supreme Court assertion that such a conviction would not be upheld, the damage would be done – either a citizen's right to free speech would have been chilled by the existence of the statute, or, in the alternative if he did exercise his rights and was charged under the statute, he would be forced to undergo the long and arduous ordeal of arrest, trial, punishment, and appeal before the Court would overturn his conviction. As this Court has noted,

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender v. Lawson, 461 U.S. 352, 358-359 (1983).

In conclusion, the statute is unconstitutional because it prohibits expressive speech or conduct that could be construed as "obnoxious" or that disturbs in "any way or in any place the students or teachers," regardless of whether such speech or conduct causes a material disruption in the learning environment of the school.

QUESTION 2

The writ should be granted because the South Carolina Supreme Court failed to recognize that Petitioner had standing to challenge Section 16-17-420 on the grounds of vagueness because the statute violates the First Amendment right to freedom of expression, allowing persons whose conduct is not protected to challenge the statute, and the South Carolina Supreme Courts should have found the statute was void for vagueness.

A.The South Carolina Supreme Court failed to recognize this Court's precedent that holds that a person whose conduct is not protected has standing to challenge a statute on the grounds of vagueness if the statute violates the First Amendment right to freedom of expression.

The South Carolina Supreme Court failed to recognize this Court's precedents and incorrectly held that Amir does not have standing to challenge the statute for vagueness because the statute was constitutionally applied to him in that he engaged in activities that were not constitutionally protected conduct. However, the South Carolina Supreme Court failed to recognize that only in cases where the statute does not violate First Amendment rights must the statute have been unconstitutionally applied to the Petitioner. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982).

Amir does have standing to challenge this statute because it infringes upon the First Amendment guarantees of freedom of speech. As this Court has held, even though a statute "may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others." *Kolender v. Lawson*, 461 U.S. 352, 358-359 (1983). This Court has stated that "precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression." *Parker v. Levy*, 417 U.S. 733, 756 (1974). In this case, the statute regulates expression. Clearly, the South Carolina Supreme Court should have allowed Petitioner to raise the vagueness of Section 16-17-420 as applied to others.

B.The South Carolina statute that forbids certain protected behavior in schools is void for vagueness.

Section 16-17-420 is unconstitutionally vague because it

fails to give a person of ordinary intelligence an opportunity to know what conduct is prohibited. It does not provide fair warning of prohibited conduct and it invites subjective law enforcement decisions. This Court has held that "although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 359 . (internal citations omitted).

In *Graynard v. City of Rockford*, 408 U.S. 104 (1972), this Court stated:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

> subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Graynard, 408 U.S. at 108-9 (internal citations omitted).

Therefore, the statute's vagueness violates the right to due process as guaranteed by the Fourteenth Amendment and that vagueness is scrutinized more heavily when First Amendment rights are implicated. The state must be particularly specific when curtailing such protected freedoms.

Section 17-16-420 is void for vagueness because one can only guess as to its meaning. The use of the ambiguous, undefined terms "obnoxious," "loitering," "unnecessarily," "interfere," and "disturb" render the statute unconstitutionally vague; as well as the use of the open-ended adverbial phrase "in any way." The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 359. In order to meet constitutional muster, a statute must not be so vague that it is

capable of criminalizing an innocent act. *Winters v. New York*, 333 U.S. 507, 520 (1948) (striking down a statute that forbade possession or distribution of printed papers "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.")

A statute is unconstitutional when "the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939). As noted above, the terms in South Carolina's statute are vague, indefinite and uncertain in many respects.

In addition, the statute clearly has the potential to inhibit a student, concerned about the deleterious effect on her future, from expressing unpopular opinions lest she violate South Carolina's statute. As stated above in Question I, such a chilling effect is not acceptable.

In conclusion, the writ should be granted because the South Carolina Supreme Court wrongly held that Amir did not have standing to challenge the statute as void for vagueness even though the statute infringes on First Amendment rights. In addition, the statute is void for vagueness because its terms are too indefinite to meet due process requirements and it fails to establish minimal guidelines to govern law enforcement, thus increasing the potential for arbitrary enforcement that could have a chilling effect on the exercise of First Amendment rights.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should issue.

Respectfully submitted,

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April 16, 2007

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Amir X. S., a juvenile under the age of seventeen, Appellant.

Appeal from Greenwood County
John M. Rucker, Family Court Judge

Opinion No. 26219
Heard September 20, 2006 – Filed November 6, 2006

AFFIRMED IN PART; VACATED IN PART

Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: This case involves a constitutional attack on a statute defining the offense of

disturbing schools. The family court upheld the statute's constitutionality and subsequently adjudicated Appellant delinquent for violating the statute. We affirm in part and vacate in part.

Factual/Procedural Background

The State filed a juvenile petition in family court in October 2004 alleging that Amir X. S. ("Appellant") violated S.C. Code Ann. § 16-17-420 (2003) by willfully, unlawfully, and unnecessarily interfering with and disturbing the students and teachers at Southside Learning Center in Greenwood County, South Carolina.

Before trial, Appellant moved to quash the juvenile petition claiming that § 16-17-420 was unconstitutionally vague and overbroad in violation of the First Amendment of the United States Constitution. Section 16-17-420 provides in pertinent part:

It shall be unlawful: (1) For any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon . . . ."

S.C. Code Ann. § 16-17-420(1).

At the hearing on Appellant's motion to quash, the State argued Appellant lacked standing to challenge the statute's constitutionality because Appellant's conduct plainly fell under its terms. The family court upheld the constitutionality of the statute and denied Appellant's motion. After hearing testimony from each party, the family court found there was sufficient evidence to adjudicate Appellant delinquent for the violation of § 16-17-420. The family court committed Appellant to ninety days in the

custody of the Department of Juvenile Justice and imposed one year of probation.

Appellant filed this appeal pursuant to Rule 203, SCACR[1] and raises the following issues for review:

I.

Is § 16-17-420 unconstitutional because it is overly broad and punishes a substantial amount of protected free speech in relation to the statute's plainly legitimate sweep?

II.

Does Appellant have standing to challenge § 16-17-420 on grounds of vagueness; and if so, is the statute unconstitutional because it is written in terms so vague that a person of common intelligence must necessarily guess at its meaning?

Law/Analysis

I. Overbreadth

Appellant argues that S.C. Code Ann. § 16-17-420 is unconstitutional because it is overly broad and punishes a substantial amount of protected free speech in relation to the statute's plainly legitimate sweep. We disagree.

The First Amendment overbreadth doctrine is an exception to the usual rules regarding the standards for facial challenges. First, because the very existence of overly broad statutes may have such a deterrent effect on constitutionally protected expression, the traditional rule of standing[2] is relaxed for facial[3] overbreadth claims involving First Amendment rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Under this relaxed rule of standing, the party

challenging a statute simply must demonstrate that the statute could cause someone else – anyone else – to refrain from constitutionally protected expression. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). In further recognition of the threat to First Amendment freedoms, any enforcement of a statute subject to an overbreadth claim is wholly forbidden until and unless a limiting construction or partial invalidation so narrows it so as to remove the seeming threat to protected expression. *Broadrick*, 413 U.S. at 613. These exceptions to the traditional rules of practice have been implemented out of concern that the threat of enforcement of an overly broad law may deter or "chill" constitutionally protected speech – especially when the overly broad law imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

In light of these exceptions to the traditional rules of practice, courts have been "sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). In developing the overbreadth doctrine, the United States Supreme Court has cautioned:

. . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct[,] and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Broadrick, 413 U.S. at 615.

In an effort to balance these varying interests, courts require that the alleged First Amendment overbreadth must not only be real, but also "substantial" in order to apply the

overbreadth exception in a particular case. *Taxpayers for Vincent*, 466 U.S. at 799-800 (quoting *Broadrick*, 413 U.S. at 615). Therefore, the doctrine of overbreadth permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep – until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protected expression. *Hicks*, 539 U.S. at 118-119.

Turning to the instant case, we first note that although conduct generally is not protected by the First Amendment, *expressive* conduct may be. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). However, we do not find that § 16-17-420 prohibits the kind of clearly expressive conduct historically subject to overbreadth adjudication in the school context. Notably, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the United States Supreme Court declared unconstitutional a school board's actions suspending students for wearing black armbands to school in protest of the Vietnam War. In *Tinker*, the court held that wearing armbands as a "silent, passive expression of opinion" was protected symbolic speech regardless of the popularity of the opinion being expressed. Restricting this type of speech when it was "unaccompanied by any disorder or disturbance" could not be tolerated under the First Amendment. 393 U.S. at 508. Prior to that, in *Edwards v. South Carolina*, 372 U.S. 229 (1963), the United States Supreme Court held that breach of the peace convictions for high school and college students peaceably assembling and protesting on public grounds were unconstitutional as violative of the First Amendment.

An analysis of § 16-17-420 is more appropriately derived from cases analyzing statutes targeting conduct termed "disruptive" to schools, with no specific prohibition

otherwise on First Amendment expressive conduct. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) is the leading United States Supreme Court decision in that context. In *Grayned*, the petitioner was convicted under an Illinois antinoise ordinance for his part in a demonstration in front of a school. He subsequently challenged the constitutionality of the ordinance which prohibited "any noise or diversion which disturbs or tends to disturb the peace or good order of a school" on grounds of vagueness and overbreadth. 408 U.S. at 108. Relying on *Tinker* as its touchstone, the court held that although the statute tended to target expressive conduct, such expressive conduct could be restricted in the school environment if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513). The court distinguished the demonstration at issue in *Grayned* from the wearing of armbands in *Tinker* primarily on the grounds that the *Tinker* students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id.* (quoting *Tinker*, 393 U.S. at 514). It further noted the limited scope of the ordinance, which it construed to punish only conduct that disrupted normal school activities – a decision necessarily made on a case-by-case basis. *Id.* at 119. The *Grayned* court concluded by saying that the city's "modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools." *Id.* at 121. Such a reasonable regulation, it held, was consistent with the First Amendment and therefore the antinoise ordinance was not invalid on its face. *Id.* at 121.

More analogous to the case before this Court is *McAlpine v. Reese*, 305 F. Supp. 136 (1970), in which the federal district court in Michigan upheld the constitutionality of a Michigan ordinance similar to § 16-17-420 against facial attacks of

vagueness and overbreadth. The Michigan ordinance at issue provided:

No person shall wilfully or maliciously make or assist in making any noise, disturbance, or improper diversion by which the peace, quietude or good order of any public, private, or parochial school is disturbed.

305 F. Supp. at 138 (citing Detroit Muni. Code, § 39-1-57 (1954)). In *McAlpine*, the district court observed that the ordinance did not by its terms "prohibit any kind of gathering or expression save that which disturbs the quietude of a school." *Id.* at 140. The court noted the "fundamental interest to our society . . . [of] the schools and their undisturbed operation" and determined that the only kind of conduct prohibited by the ordinance was not "free speech" but rather "free abuse of others." *Id.* at 141. Ultimately, the court rendered the ordinance unsuitable for overbreadth invalidation by concluding that the type of conduct prohibited could "not be tolerated in any ordered society." *Id.* The fact that free speech was intermingled with such conduct did not automatically call for constitutional protection. *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). At the same time, the *McAlpine* court, like the *Grayned* court, was careful in its opinion to distinguish the scope of the Michigan ordinance from other prohibitions on expression that did not involve the disruption of schools, reiterating that the latter would be subject to constitutional protection. *Id.*

Similarly, in *S.H. B. v. State of Florida*, 355 So.2d 1176 (Fla. 1977), the Florida Supreme Court upheld the constitutionality of a statute prohibiting the willful interruption or disturbance of "any school." Fla. Stat. § 871.01 (1973). The plaintiff, convicted under the statute for behavior that included "running through the halls of a school in session, disobeying the lawful and reasonable requests of

school officials, and repeated loud utterances." claimed the statute was overly broad on its face. *S.H.B.*, 355 So.2d at 1179. He asserted that an overbreadth analysis of the statute should be governed by cases defining the constitutional limits of breach of the peace statutes. The Florida court disagreed and held that the statute at issue only prohibited disturbances of lawful assembly (i.e. school gatherings) and therefore was limited in its application in a way that breach of the peace statutes were not. *Id.* at 1178. The court recognized that school gatherings are "fragile by their nature," *id.*, and comparing the school environment to a general public forum, the court noted that in schools, "a single individual may cause havoc in a situation in which hundreds of others have sought a common purpose." *Id.* The court emphasized that certain conduct – even if "expressive" – could disrupt the school environment even where it might not elsewhere. *Id.* The Florida court, like the *Grayned* court, condoned a case-by-case approach to weeding out overly broad applications of the statute and held that the statute was constitutional on its face. *Id.*

Applying these principles to South Carolina's disturbing schools statute, S.C. Code Ann. § 16-17-420(1), we find that it does not substantially prohibit First Amendment speech. By its terms, the statute does not apply to protected speech. Specifically, the disturbing schools statute does not prohibit spoken words or conduct "akin to 'pure speech.'" *Tinker*, 393 U.S. at 508. Nor does the statute broadly regulate conduct like a breach of the peace statute.[4] *Broadrick*, 413 U.S. at 616. Instead, § 16-17-420 criminalizes conduct that "disturbs" or "interferes" with schools, or is "obnoxious." S.C. Code Ann. § 16-17-420(1)(a) and (c). In applying the *Tinker* distinction between direct restrictions on silent, passive expression of opinion versus restrictions on expression when accompanied by disorder or disturbance of schools, § 16-17-420, like the regulations at issue in *McAlpine* and *S.H.B.*, clearly applies to the latter. Such

conduct is not protected by the First Amendment and accordingly, we hold that § 16-17-420 is not a substantial threat to protected speech requiring overbreadth adjudication.

The overbreadth doctrine additionally provides that any threat or deterrence to constitutionally protected expression may be removed by a limiting construction on the challenged statute. *Broadrick*, 413 U.S. at 613. Analyzed from this perspective, § 16-17-420 is limited in its application by its own terms so as to remove any substantial threat to constitutionally protected expression. First, the statute specifically deals with the disturbance of students and teachers in South Carolina's schools, and not a disturbance in just any public forum. *See S.H.B.*, 355 So.2d at 1178. Furthermore, it does not explicitly prohibit any type of gathering or expression except those which disturb the learning environment in South Carolina's schools. Those who wish to engage in this type of "expression" are free to either do so elsewhere; or do so in the school environment in a way that does not disturb schools. *McAlpine*, 309 F. Supp. at 140. Finally, the statute is limited in the type of conduct that may be punished. The disturbance or interference is required to be done "wilfully" or "unnecessarily." S.C. Code Ann. § 16-17-420(1)(a).

Taken to its outermost First Amendment boundaries, § 16-17-420 is most accurately characterized as "intertwining" speech and non-speech elements. *Cox v. Louisiana*, 379 U.S. at 563; *McAlpine*, 309 F. Supp at 140. Appellant argues that this might include constitutionally protected expression, but we find this is not "substantially" so. The proper functioning of schools is "a topic of great and fundamental interest to our society." *McAlpine* 309 F. Supp. at 140. Clearly the State has a legitimate interest in maintaining the integrity of its education system.[5] This objective is necessarily achieved in part by classroom

discipline. Because the school environment is "fragile by [its] nature," it requires a certain level of conduct and cooperation on the part of both the student and the teacher in order to function effectively for all its participants. *S.H.B.*, 355 So.2d at 1178. Any conduct in this context that interferes with the State's legitimate objectives may be prohibited. "The fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *McAlpine*, 309 F. Supp. at 140.

Appellant urges this Court to consider a school debate scenario where an individual could be prosecuted under § 16-17-420 for expressing a "disturbing" view, which in turn might implicate other students who openly disagree with that view in a manner deemed "obnoxious." S.C. Code Ann. § 16-17-420(1). The innocent scenario suggested by Appellant is clearly not within the scope of § 16-17-420, nor would this Court construe it that way. *Tinker* permits the State to enforce its significant interest in its education system by punishing behavior that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 506. Section 16-17-420 prohibits no more than this. Moreover, the United States Supreme Court has mandated a case-by-case approach to address whatever overbreadth may exist. *See Grayned*, 408 U.S. at 119-120; *Broadrick*, 413 U.S. at 615. *See also S.H.B.*, 355 So.2d at 1178. A case-by-case approach to the enforcement of the statute allows this Court to act accordingly in the unlikely event that a person genuinely exercising his constitutional right to expression – such as the debate team member envisioned by Appellant – becomes a target of § 16-17-420. *See S.H.B.*, 355 So.2d at 1178; *McAlpine*, 309 F. Supp. at 141.

Any fertile legal imagination can dream up conceivable ways in which enforcement of a statute violates First Amendment rights. *Grayned*, 408 U.S. at 111, n. 15. However,

conceivable overbreadth must be substantial in order to merit overbreadth adjudication. Notwithstanding all other laws of this state, Appellant and others are welcome to express themselves in a way that "disturbs" others in any other public forum without offending § 16-17-420. Because of the state's fundamental interest in protecting its schools, § 16-17-420 draws the line on conduct that materially disturbs *normal school activity* – the very same constitutional line drawn by *Tinker* and its progeny. We therefore hold that § 16-17-420 does not punish a substantial amount of protected speech, and accordingly, does not warrant overbreadth adjudication.

II. Vagueness

Respondent contends that Appellant lacks standing to make a facial vagueness challenge to the constitutionality of § 16-17-420. We agree.

The traditional rule of standing for facial attacks on statutes, *supra* n.3, applies to facial vagueness challenges such as the one before this Court. "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Michau*, 355 S.C. 73, 76, 583 S.E.2d 756, 758 (2003) (quoting *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001)). The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies. Therefore, "one to whose conduct the law clearly applies does not have standing to challenge it for vagueness" as applied to the conduct of others. *Village of Hoffman Estates*, 455 U.S. at 495; *Michau*, 355 S.C. at 77, 583 S.E.2d at 758.

There can be no doubt that Appellant's conduct falls within the most narrow application of § 16-17-420. Appellant's teacher testified to the family court that for a period of over

two hours, Appellant behaved in a way that was wilfully disruptive and unnecessary. Appellant paced about the classroom and refused to remain in his desk; cursed to his teacher and other students; and harassed one student with comments about the student's mother. For over two hours, Appellant's teacher patiently attempted to reason with him regarding his classroom behavior, to no avail. Left with no other choice but to remove Appellant from the classroom so that she and the other students could focus on their educational objectives, the teacher asked another staff member to escort Appellant from the room. Appellant, however, did not stop there. Appellant began yelling and cursing, swung a punch at his teacher as he left the classroom, and continued his tirade as he was escorted down the hall.

Moreover, Appellant had prior notice that this type of conduct was prohibited. A juvenile petition from May 2004 charged Appellant for a violation of the very same statute he now alleges is unconstitutionally vague pursuant to an October 2004 juvenile petition. Accordingly, Appellant does not have standing to facially challenge § 16-17-420 on grounds of vagueness.

Because Appellant does not have standing to challenge § 16-17-420 on grounds of vagueness, we do not address the merits of his argument that the terms of § 16-17-420 are so vague that a person of common intelligence must necessarily guess at its meaning. *See Broadrick*, 413 U.S. at 607 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). The family court's ruling that § 16-17-420 is not unconstitutionally vague is vacated.

Conclusion

For the foregoing reasons, we affirm the family court's decision that § 16-17-420 is not unconstitutionally

overbroad. Because Appellant does not have standing to challenge § 16-17-420 for vagueness, the family court's decision on that matter is vacated.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[1] An appeal involving "a challenge on state or federal grounds to the constitutionality of a state law . . . where the principal issue is one of the constitutionality of the law" is heard in this Court. Rule 203(d)(1)(A)(ii), SCACR.

[2] The traditional rule of standing for facial attacks provides that one to whom application of a statute is constitutional may not attack the statute on grounds that it might be unconstitutional when applied to other people or situations. *United States v. Raines*, 362 U.S. 17, 52 (1971).

[3] A facial challenge in this context is a claim that the law is incapable of any valid application. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 494 n. 5 (1982).

[4] Breach of the peace statutes are generally attacked on grounds of overbreadth and vagueness because if not drafted with proper specificity, they have a strong potential for infringement on First Amendment rights in otherwise peaceable assembly. *See Coates v. Cincinnati*, 402 U.S. 611 (1971); *Cox*, 379 U.S. 559; *Edwards*, 372 U.S. 229. However, *Grayned* and its progeny clearly indicate that the constitutionality of statutes that specifically address a "breach of the peace" *in schools* are to be considered in light of the "special characteristics of the school environment." 408 U.S. at 116 (quoting *Tinker*, 393 U.S. at 506).

[5] The General Assembly originally enacted § 16-17-420(1) in 1919 as a statute to protect schools for "women and girls." 1919 S.C. Acts 239. The statute was amended in 1968 to apply to "any" school. 1968 S.C. Acts 2308. Today § 16-17-420 is part of Title 16, Chapter 17 of the South Carolina Code which is appropriately titled "Offenses Against Public Policy."

January 18, 2007

Appellate Defender Eleanor Duffy Clary
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

Re: S., Amir X., In the Interest of

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ Jean H. Toal	C.J.
s/ James E. Moore	J.
s/ John H. Waller, Jr.	J.
s/ E.C. Burnett, III	J.
s/ Costa M. Pleicones	J.

January 18, 2007."

The remittitur is today being forwarded to the lower court.

Very truly yours,
s/
Daniel E. Shearouse, Clerk

DES/jjp

cc: Assistant Attorney General Deborah R. J. Shupe
Solicitor Jerry W. Peace